No. 92-92

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER, as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,
Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can the phrase "discharge, dispersal, release or escape of ... pollutants into or upon land ... or any water course or body of water" in the pollution exclusion clause of the standard comprehensive general liability insurance policy reasonably be interpreted to refer to the seepage of chemical wastes from containment ponds into the groundwater?

2. Does a federal appellate court have the power to direct entry of judgment contrary to a jury verdict, where the appellee did not renew its motion for directed verdict and did not file a motion for judgment n.o.v.?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners Broderick Investment Company, a partnership and successor to Broderick Wood Products, Inc., The Colorado National Bank, as trustee, and The First Interstate Bank of Denver, N.A., as trustee, and respondent, The Hartford Accident & Indemnity Company.

In addition, several insurance companies were parties to the case in the district court and settled with the petitioners before trial. These companies are United States Fidelity & Guaranty Co.; Truck Insurance Exchange (The Farmers Group); The Continental Insurance Co.; Century Indemnity Co.; Aetna Casualty & Surety Co.; The Travelers Insurance Co.; and The Phoenix Insurance Co. Petitioners believe that these companies no longer have an interest in the outcome of the case and for that reason, they are not named as parties in the Petition for Certiorari.

The parent company of petitioner The First Interstate Bank of Denver, N.A., is First Interstate Bancorp.

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Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and the order on rehearing are reported at 954 F.2d 601 (10th Cir. 1992), and included in the Appendix at 1a-17a. The court of appeals order requesting certification to the Colorado Supreme Court, and the response of the Colorado Supreme Court, are included in the Appendix at 20a-30a. The decision of the district court interpreting the pollution exclusion clause was oral and is unreported; the transcript of the ruling is included in the Appendix at 31a-36a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 8, 1992. A timely petition for rehearing was granted in part and denied in part on April 15, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (West Supp. 1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The texts of the Seventh and Tenth Amendments to the United States Constitution are reproduced in the Appendix at 37a. The text of 28 U.S.C.A. § 1652 (1966) is reproduced in the Appendix at 37a, and the text of Rule 50(b), Fed.R.Civ.P., in effect at the time of trial in 1989, is reproduced in the Appendix at 38a.

STATEMENT OF THE CASE

A. Factual Background.

1. The parties. Petitioner Broderick Investment Company is a partnership and the successor in interest to Broderick Wood Products, Inc. The latter company was formed in 1946 to treat wood with preservative chemicals at a plant in Adams County, Colorado. Its founder, William S. Broderick, placed its stock in trusts administered by the two other petitioners, The Colorado National Bank of Denver and what is today The First Interstate Bank of Denver, N.A. Broderick Wood Products ceased operations in 1981 and was dissolved in 1982; Broderick Investment Company, a partnership whose partners are the two bank trustees, succeeded to the company's rights and obligations. This petition refers collectively to the petitioners as "Broderick".

In the mid-1960s and early 1970s, respondent Hartford Accident & Indemnity Company ("Hartford") and other insurers developed a new "pollution exclusion" clause for use in the industry's standard "Comprehensive General Liability" ("CGL") insurance policy. The insurers intended, and represented to state regulators, that the policy would provide coverage for pollution damage unless the damage was intended or expected. Broderick purchased such policies from Hartford from 1976 through 1984, to protect against liability to third parties arising from the operations of Broderick's wood treatment facility.

2. Broderick's operations. At the Broderick plant, wood products such as telephone poles and railroad ties were pressure-treated with either creosote or pentachlorophenol, the impregnated wood was steam-cleaned, and as much preservative as possible was recaptured. The residue, which was 98 percent water and 2 percent chemicals and oils, was piped into a containment pond, called the "main pond", on the Broderick site. Built with the plant in 1946, the main pond represented the state of the art in the industry. Tr. Vol. III at 352-53, 394-95.

The main pond was intended to contain the wastes. Tr. Vol. IV at 565-73, 582. The pond was dug down to a natural clay layer, id. at 564-65, and raw cement was added. Sam Tait, then general manager and later president, watched the construction crew place approximately two inches of raw cement up and down the banks to prevent seepage, but did not recall whether cement was placed on the bottom. Tr. Vol. IV at 565; Tr. Vol. V at 654. Nonetheless, Tait believed that the entire pond was lined with raw cement and so indicated in writing before this dispute arose. Ex. CW ("original pond was excavated during 1946 and ... was sealed off with powdered cement"). Hartford's agent, Richard Rohrer, noted during a conversation with James Bollig, the Broderick employee who bought the insurance: "when ponds dry out (water) mixture will be bagged & hauled to Calif for disposal (under seal-cement to keep it from seeping into ground No problems since 1946....[]." Ex. CO (emphasis added); Tr. Vol. II at 133-34. Later, when Forrest Dean, a crane operator, attempted to dredge accumulated sludge off the bottom of the main pond, he encountered a hard, impenetrable material that was as hard as cement. Tr. Vol. VI at 859, 870-71. In 1989, Dr. Andrew Middleton, an environmental engineer, examined chunks of material taken from the main pond, and testified that they appeared to contain cement. Tr. Vol. V at 765-66.

The second pond, created a few years after the first, had a larger surface area and very shallow depth. It served to capture any overflow from the main pond and to prevent spills onto the land. Tr. Vol. IV at 572-73. The so-called "third pond" was actually not a "pond" at all; it was a small collection area for spillage and drippage out of the intake equipment feeding the main pond, Tr. Vol. IV at 608, and

was not identified as a source of any groundwater contamination, Tr. Vol. V at 726.[1]

William Broderick, the owner, insisted that the wastes be contained. Tr. Vol. IV at 567-68; Tr. Vol. VI at 841-43. His employees walked the area around the ponds at least once a month, looking for signs of seepage. Ex. CW. None was found after 34 years. Id.

3. Groundwater damage. Yet seepage of wastes into the groundwater did occur. Chemicals seeped from the main pond and the overflow pond, as well as from plant equipment in the plant process area. Tr. Vol. V at 735-39. See also Jury Instr. 2; Verdict, ¶¶ 1, 2; Answer Brief of Appellees at 8 (filed in 10th Cir. July 27, 1990); Appellees' Supplemental Brief at 20 (filed in 10th Cir. Oct. 18, 1991). Groundwater contamination was discovered in late 1982, when a landfill north of the Broderick site detected pentachlorophenol in one of its monitoring wells. The discovery was reported to the State of Colorado, which notified the EPA; the EPA informed Broderick in early 1983. Tr. Vol. III at 475-77; Vol. VI at 985-86. At that point, the source of the pentachlorophenol was unknown; it may have originated from Broderick, from another wood treatment plant immediately east of the Broderick plant, or from the landfill. Tr. Vol. III at 476-77; Vol. VI at 986-87.

The Broderick trustees immediately commissioned a hydrogeologic study, which involved the drilling of multiple groundwater wells. By mid-1983 the study concluded that chemicals leaking out of one or more of the Broderick ponds had seeped through the soils and entered groundwater. Tr. Vol. III at 478-83; Vol. VI at 986-87. Subsequent investigation showed that chemicals had been entering the groundwater during each of the years when liability insurance had been purchased

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[1]Beneath the ponds was a natural clay layer. Clay is a common liner material, Tr. Vol. VIII at 1300, and is part of today's EPA standard, Tr. Vol. V at 741. In the context of Broderick's effort to build ponds to contain the wastes, the clay layer was considered part of the containment system. This was not an instance of wanton dumping of waste onto the ground, which is the type of activity the pollution exclusion was intended to exclude.

from Hartford, 1976-1984, which was an undisputed fact at trial. Tr. Vol. V at 735-37; Vol. VI at 889.

The plant process area was not discovered as a source of contamination until 1989. The plant source was caused by leakage from underground pipes and valves, from tanks, pumps, and other machinery (collectively, the "plant equipment"), and from above-ground drip tracks used to dry treated wood. Tr. Vol. V at 736-39. Undisputed expert testimony was that approximately 30 percent of the groundwater contamination could be attributed to leakage from the plant process area. Id. at 755-566. The jury found that the groundwater contamination from the ponds and from the plant area constituted one occurrence. Verdict, ¶ 1 at 1.[2]

B. Procedural Background.

1. Pretrial proceedings. In February, 1986, the Environmental Protection Agency ("EPA") sued Broderick Investment Company and the two trustees of the Broderick Wood Products' trusts, seeking recovery of the environmental response costs that had been and would be incurred in cleaning up the facility. Shortly thereafter, United States Fidelity & Guaranty Company, the insurer of one of the trustees of the Broderick trusts, filed this diversity suit pursuant to 28 U.S.C.A. § 1332(a)(1) (West Supp. 1992) against Broderick, the trustees, Hartford, and other insurers for the trustees, seeking a declaration of the parties' rights and obligations. Before trial, Broderick settled with all of

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[2]The court of appeals erred in stating that "the jury verdict form focused only on the seepage of the toxic chemicals from the holding ponds into the groundwater." Pet. App. at 10a. The first question on the verdict form expressly directed the jury to consider the plant source of contamination in determining whether there had been one or two occurrences. Verdict, ¶ 1; see also id. ¶ 2(A) through (I)(directing jury to answer as to "plant, ponds or both"). The other questions did not specify a source of groundwater contamination, thereby leaving the jury free to consider both the ponds and the plant process area. See id. ¶ 2 (A) through (I) (asking the jury to make findings concerning "damage to the groundwater or offsite properties" and to "the release or escape of the chemicals into the ground water.")

designating Broderick the plaintiff and assigning to Broderick the burden of proving coverage.

Before trial, the district court interpreted in accordance with Colorado law two key provisions of the CGL policies, the occurrence definition and the pollution exclusion clause. The district court's interpretation of the occurrence definition and the jury's finding of an occurrence were affirmed by the court of appeals, Pet. App. at 9a, and are not at issue here.

2. District court rulings. The "pollution exclusion" clause excludes the following:

> property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

In essence, the clause excludes coverage for a "discharge, dispersal, release or escape" of pollutants "into or upon land ... or any water course or body of water" and preserves coverage if "such discharge, dispersal, release or escape is sudden and accidental."

The district court recognized that as to the containment ponds, there were two events to which the phrase "discharge, dispersal, release or escape" could apply: (1) the initial placement of wastes in the ponds; or (2) the seepage of wastes out of the ponds into the groundwater. Pet. App. at 34a-36a. Consistent with well-established principles of insurance law, both generally and in Colorado, the district court chose the interpretation that favored coverage and held that the operative "discharge, dispersal, release or escape" was the seepage from the ponds into the groundwater. Id. The district court also predicted that the Colorado Supreme Court would interpret the phrase "sudden and accidental", in the exception to the exclusion, to mean "unexpected and unintended". Id. at 34a-35a.

The jury was instructed accordingly and was asked, inter alia, for each of the years Hartford insurance was in effect (1976 - 1984), whether the discharge, dispersal, release or escape of chemicals into the groundwater was unexpected and unintended by Broderick. The jury decided this question in favor of Broderick for years 1976 through 1983, and the district court entered judgment accordingly. Hartford neither renewed its motion for directed verdict at the close of the evidence nor filed a motion for judgment n.o.v.

3. Tenth Circuit proceedings. On appeal, Hartford argued that the district court's interpretation of the pollution exclusion clause was erroneous. After oral argument, the Tenth Circuit attempted to certify to the Colorado Supreme Court the interpretation of the phrases "discharge, dispersal, release or escape" and "arising out of" as used in the pollution exclusion clause. Pet. App. at 20a-27a. The Colorado Supreme Court denied the request. Id. at 28a.

In the Certification Order, the court of appeals had expressly recognized that the phrase "discharge, dispersal, release or escape" could reasonably apply to either (1) the placement of wastes in the ponds, or (2) the seepage of wastes out of the ponds into the groundwater. Pet. App. at 23a, 25a-26a. By the time this Order was issued, the Colorado Supreme Court had confirmed the district court's prediction that "sudden and accidental" meant "unexpected and unintended." See Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090-92 (Colo. 1991). Accordingly, the choice of the initial placement would mean that there was no coverage because that placement was not "unexpected and unintended"; choice of the seepage would confirm coverage because the jury had found that the seepage was unexpected and unintended. Under this analysis, controlling Colorado principles of insurance law required affirmance: if there are two reasonable interpretations of a clause, a court must adopt the interpretation that provides coverage. Chacon v. American Family Ins. Co., 788 P.2d 748, 750 (Colo. 1990); Hecla, 811 P.2d at 1090.

Yet in its final decision, the Tenth Circuit abandoned this analysis. It addressed only the pond source, not the plant source, of groundwater contamination. The panel reasoned that because the phrase "discharge, dispersal, release or escape" was in the disjunctive, "the exclusion is triggered if even one of the four words unambiguously describes [Broderick's] placement of waste into the ponds." Pet. App.

at 11a. The panel then concluded that "applying any reasonable interpretation, the phrase ... 'discharge ... into or upon the land' describes ... [the] placement of waste into the ponds." Id. The panel rejected Broderick's argument that "discharge" means "to let go", "release from confinement", or "to give outlet to", none of which fits the placement of wastes in ponds built to confine, contain, and store the waste. Id.

Applying Colorado case law interpreting "arising out of" in automobile insurance policies, the panel ruled that the phrase embodies a "but for" analysis and concluded that the "contamination of the groundwater could not have occurred but for [Broderick's] discharge into the holding ponds." Id. at 12a-13a. Because the deposit of wastes into the ponds was not sudden or accidental, the panel held that Broderick's claim for coverage was barred by the pollution exclusion clause. Id. at 13a. The panel reversed and remanded with directions to enter judgment for Hartford. Id.

4. Order on rehearing. In its petition for rehearing, Broderick argued that the court of appeals had no power to direct entry of judgment for Hartford, because Hartford had not renewed its motion for directed verdict and had not filed a motion for judgment n.o.v. Broderick also argued that even under the court of appeals interpretation of the exclusion, the record supported the finding of coverage for contamination arising from the main pond and the plant equipment.

As to the main pond, Broderick asserted that the panel had erroneously assessed the sufficiency of the evidence and mistakenly concluded that the pond was not lined with cement. Because the panel was required to accept the evidence of cement as true, Broderick argued, the deposit of wastes into the main pond, even if characterized as a "discharge, dispersal, release, or escape," was into or upon cement, not land, rendering the pollution exclusion clause inapplicable to that event.

As to the plant equipment, Broderick noted that the placement of chemicals in pipes and machinery in the course of operations also could not be characterized as a "discharge, dispersal, release or escape" "into or upon land." Thus, the pollution exclusion clause was inapplicable to that event as well.

Noting that the court of appeals could affirm on any ground supported in the record, Broderick argued that, at a minimum, the court should affirm the finding of coverage as to the main pond and the plant equipment. Broderick also challenged the panel's interpretation of the pollution exclusion clause, asserting that the panel had not adhered to Colorado law concerning interpretation of exclusions and had thereby violated Erie R. Co. v. Tompkins, 304 U.S. 64 (1937). Broderick requested in the alternative that the court of appeals renew its request to the Colorado Supreme Court for certification.

The panel granted rehearing in part and denied it in part. The panel clarified its holding concerning the main pond and "reemphasize[d] that [the court] adopted all of [Broderick's] characterizations of the evidence as true." Pet. App. at 16a. This statement required the conclusion that the main pond was lined with cement and was not "land", thereby rendering the phrase "discharge, dispersal, release or escape" inapplicable to the initial placement of wastes in the ponds. Nonetheless, the panel held that Broderick had "discharged waste into the land and is not entitled to coverage for any damage that emanated from its discharge of waste into the main pond or any of the other ponds." Id.

Turning to the plant equipment, the panel held that the jury had been incorrectly instructed regarding the pollution exclusion. Id. The court vacated its earlier direction to the district court to enter judgment for Hartford, and remanded for a new trial "to determine whether coverage exists for the contamination caused by waste that emanated from the 'plant equipment' and for further proceedings consistent with this opinion." Id. The court denied all other aspects of the petition for rehearing. Id. at 17a.

REASONS FOR GRANTING THE WRIT

Petitioners are aware that "state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." Haring v. Prosise, 462 U.S. 306, 314 n.8 (1983). However, the features of this case make it one of the exceptional cases to which Haring refers.

First, the decision resolved an issue of tremendous national significance: the scope and meaning of the pollution exclusion clause in

the standard CGL policy. The clause is the subject of scores of cases all over the country, a byproduct of the federal environmental laws that impose widespread liability for the cost of cleaning up environmental damage. Although numerous cases have been brought, this case is one of the very few in which a full factual record has been developed and, even more uniquely, in which a jury has found that the insured neither intended nor expected the environmental damage. The complete factual record will facilitate this Court's resolution of the significant legal issues in an area in which lower courts throughout the nation are greatly in need of guidance.

Second, although the meaning of the pollution exclusion is governed by state law, "the same contract language is at issue in nearly all insurance litigation pertaining to the years 1971 to 1986." Pet. App. at 3a (emphasis added). Yet that language has been interpreted in diametrically opposite ways by the Third and Tenth Circuits, as well as by federal district courts -- differences that cannot be attributed to differences in state laws because the applicable contract interpretation principles do not vary significantly from state to state. Some insureds therefore may have coverage and others may not, due solely to the accident -- or fortuity -- of the federal district or circuit in which the site is located and either party's decision to seek a federal forum.

These considerations make the Tenth Circuit's failure to adhere to Erie exceptionally significant and therefore worthy of this Court's review. The sheer magnitude of environmental contamination and the staggering cost of remediation give both insureds and insurers an irresistible incentive to shop for the most favorable forum available. Because diversity jurisdiction can often be established, Erie serves as the only protection against making federal courts unwitting players in such a strategy. Absent strict compliance with Erie, the coverage decision could well be different depending on whether the case is brought in state or federal court.

The court of appeals decision also violated a principle of federal procedural law. Under this Court's longstanding precedent, rooted in the Seventh Amendment, the federal appellate courts have no power to direct the entry of judgment for the loser of a jury verdict, in the absence of a renewed motion for directed verdict at the close of the evidence and a timely-filed motion for judgment n.o.v. The Tenth Circuit's decision directing entry of judgment for Hartford on the issue of

coverage for groundwater contamination arising from the retaining ponds directly conflicts with this rule. At a minimum, the Court should grant certiorari, reverse the court of appeals decision summarily, and remand for reconsideration in light of the Court's precedent.

ARGUMENT

I. The Court Of Appeals Violated Erie By Truncating The Analysis Required By Colorado Law.

1. The Tenth Circuit's interpretation of the pollution exclusion violated the court's duty to apply state law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); U.S. Const. amend. X; 28 U.S.C.A. § 1652 (1966). Here, that duty required the Tenth Circuit, before denying coverage on the basis of the pollution exclusion, to ask whether Hartford had shown that (1) the exclusion applied and (2) the exclusion was not subject to any other reasonable interpretation. Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090 (Colo. 1991); American Family Mut. Ins. Co. v. Johnson, 816 P.2d 952, 953 (Colo. 1991). The Tenth Circuit, however, conducted only the first of these inquiries: it held that Broderick's placement of waste in the containment ponds constituted a "discharge ... into or upon the land," for which there was no coverage. Pet. App. at 11a. Assuming for the sake of argument that this was a reasonable interpretation, it was only the beginning of the controlling analysis. The Tenth Circuit's failure even to address, much less to resolve, the second component led to a decision that conflicts in principle with a decision of the Colorado Supreme Court, as well as with decisions of other courts, including the Third Circuit. See infra at 11-13. These conflicts surely encourage the forum shopping that Erie was intended to prevent and therefore warrant this Court's review.

2. The case also permits the Court to clarify that de novo review under Salve Regina College v. Russell, 111 S.Ct. 1217 (1991), leaves ample room for the state rule of decision to inform the appellate court's inquiry. Here, the substantive issue before the Tenth Circuit was not whether the district court's interpretation of the pollution exclusion was correct in the abstract, but rather, whether the district court had correctly found that the pollution exclusion was subject to more than one reasonable interpretation. Hecla, 811 P.2d at 1090; Johnson, 816 P.2d at 953. If so, then the interpretation favoring cover-

age was proper as a matter of law, without regard to whether the court of appeals would have chosen that interpretation had the court of appeals decided the issue in the first instance.

3. Had the Tenth Circuit undertaken the second step for analyzing the applicability of an exclusion, the court would have found abundant evidence of both the existence and the reasonableness of another interpretation.

a. Decisions Of Other Courts. The decisions of other courts, most notably the Colorado Supreme Court and the Third Circuit, confirm that Broderick's interpretation is reasonable. In Hecla, the Colorado Supreme Court addressed other issues arising under the pollution exclusion clause, i.e., the duty to defend and the meaning of the phrase "sudden and accidental" in the pollution exclusion clause. Yet the court's analysis plainly focused not on the initial placement of wastes in the Yak Tunnel -- an unlined, manmade, underground tunnel that was as much the "land" as the unlined Broderick secondary pond, see 811 P.2d at 1085 n.2 -- but rather, on the unexpected and unintended release of wastes from the tunnel into the California Gulch. Id. at 1092. Hence, the Tenth Circuit's holding conflicts in principle with Hecla's focus: had the Colorado Supreme Court adopted the Tenth Circuit's view, coverage would have been denied because the initial deposits of wastes in the tunnel were neither sudden nor accidental. At a minimum, Hecla's focus on the secondary "discharge, dispersal, release or escape" certainly confirms the reasonableness of Broderick's interpretation.

In New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) (Delaware law), the Third Circuit focused its analysis of the pollution exclusion clause on the "discharge, dispersal, release or escape" of pollutants from the landfill. Id. at 1169, 1199-1203. If this was not a reasonable interpretation, then the Third Circuit's exhaustive opinion was wholly unnecessary -- coverage would have been denied at the outset because the initial disposal of wastes in the landfill was both expected and intended. See also Claussen v. Aetna Cas. & Sur. Co., 865 F.2d 1217, 1220 (11th Cir. 1989)(in certifying to Georgia Supreme Court the interpretation of "sudden and accidental" in the exception to the pollution exclusion, Eleventh Circuit asked whether there was coverage "for the discharge of pollutants from a landfill over an extended period of time")(emphasis added).

Although the Tenth Circuit's conflict with New Castle is not an intercircuit conflict concerning either federal law or the law of a single state, the conflict is nonetheless significant. Conflicting decisions of federal circuit courts concerning the meaning of identical policy language under uniform state law principles of interpretation surely encourages the forum shopping that Erie was designed to prevent.

In addition, the very fact that the circuit courts decided the issue differently -- not the correctness of either view -- is highly significant under Colorado law and demonstrates the Tenth Circuit's error in this case. See Hecla, 811 P.2d at 1092 n.13 (conflicting judicial authority "'dispels the ... contention that the exclusionary language is clear'") (quoting Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 456 N.W.2d 570, 578 (1990)). This principle may well explain the Colorado Supreme Court's decision to deny the panel's certification request. In the Certification Order, the panel itself confirmed that there is another reasonable interpretation of the clause. See Pet. App. at 25a-26a (noting that "discharge" could reasonably be read to mean "a final relinquishment of wastes" and that record "adequately supports the jury's implicit finding" that Broderick viewed its activities as "storage", not as a final relinquishment of wastes). The Colorado Supreme Court may have concluded that certification was unnecessary because Hecla provided the panel with ample guidance once the panel recognized the reasonableness of the interpretation that leads to a finding of coverage. See Hecla, 811 P.2d at 1090.[3]

See also Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368, 373-74 (Minn. App. 1992) (seepage of wastes from a landfill, not the initial deposit of wastes in a landfill, triggered the pollution exclusion clause); Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541, 1549 (S.D. Fla. 1987)(insurer had duty to defend because even though insured intentionally caused the dumping of oil, insured did not expect or intend the release of PCBs

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[3]The panel rejected Broderick's request, made in the petition for rehearing, to renew the certification request. Pet. App. at 17a. Thus, this Court is the court of last resort for Broderick -- the insured who did not select the federal forum -- to obtain a ruling enforcing the pollution exclusion clause in accordance with the controlling law.

from the oil into the aquifer); National Grange Mut. Ins. Co. v. Continental Cas. Ins. Co., 650 F. Supp. 1404, 1410-12 (S.D.N.Y. 1986)(insurer had duty to defend insured who had intentionally dumped ash on site because subsequent release of chemicals into environment was sudden and accidental).

b. Language Of The Clause. Broderick's interpretation finds ample support in the language of the pollution exclusion. While the panel limited its analysis to the words "discharge ... into or upon land," the clause is not so limited. It refers to "discharge, dispersal, release or escape of ... pollutants into or upon land, the atmosphere, or any water course or body of water." When the full text is considered, the clause can reasonably be read to refer to the seepage of wastes from the ponds through the subsoil and into the groundwater.

The clause refers to a "discharge, dispersal, release or escape" "into or upon land ... or any body of water or water course." (Emphasis added.) The issue in this case is coverage for damage to groundwater, not damage to land.[4] Thus, it is certainly reasonable to focus the inquiry on the discharge into the groundwater, which is a "body of water or water course."

In addition, the fact that "discharge" is used with "dispersal, release or escape" makes reasonable the conclusion that "discharge" was used in the sense that the other words convey, i.e., a letting go, freeing or releasing from confinement or storage, not a placement into confinement or storage. See Webster's Third New International Dictionary 644, 653, 1917, 774 (1971)(defining "discharge", "dispersal", "release", and "escape", respectively). See also Sylvester Bros., 480 N.W.2d at 374. Accord Pet. App. at 25a-26a. For instance, in common parlance, we refer to a "discharge" from military service. Similarly, under the Clean Water Act, there is no "discharge of a pollutant" unless and until the pollutant is released "from ... a point source" into a "water of the United States." 33 U.S.C.A. § 1362(12)(1986)(emphasis added).

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[4]The policy contains a separate exclusion, the "owned property" exclusion, which prevents recovery for damages to the insured's land, except where clean-up of the land is essential to the clean-up of the groundwater. See Pet. App. at 34a.

The panel reasoned that if any one of the words "discharge, dispersal, release or escape" leads to a finding of no coverage, then there is no coverage. Pet. App. at 11a. However, Colorado law requires the insurer to prove that its interpretation is the only reasonable one. See Hecla, 811 P.2d at 1090; Johnson, 816 P.2d at 953. Thus, if any one of the terms "discharge, dispersal, release or escape" results in coverage, then coverage should be found, even if one of the other terms might lead to a finding of no coverage. "Release" and "escape" and even "dispersal" can be read to refer to the seepage of wastes from the ponds. See, e.g., Pet. App. at 25a-26a; Webster's Third New International Dictionary at 1917, 774, 653. Because the jury found that the leakage of wastes was unexpected and unintended, these words lead to a finding of coverage, and Hartford's interpretation is not the only reasonable one.

c. Purpose Of Liability Insurance. Broderick's interpretation is most consistent with the basic purpose of the CGL policy at issue, further confirming its reasonableness. Liability insurance protects the insured against liability for injury to the person or property of another. Thus, the policy should be construed by reference to the third-party injury or damage that triggers the claim for coverage.

Here, the placement of wastes in the ponds did not cause any third-party damage or create any liability for Broderick. If the ponds had worked as intended, they would have contained the wastes and prevented any third-party damage. Only the failure of the ponds, and the seepage of wastes from the ponds through the subsoil and into the groundwater created liability and triggered the policy. See Sylvester Bros., 480 N.W.2d at 373-74. By focusing on that event, Broderick's interpretation gives the exclusion meaning in the context in which it was intended to apply. The panel's interpretation, by contrast, excludes pollution before it even occurs -- surely an untenable result.

4. The court of appeals erred in stating that Broderick's interpretation "attempts to graft an intent requirement related to damages onto the unambiguous language of the policy's exclusion clause." Pet. App. at 12a. The court's confusion relates to the distinction between the insured's intent to cause damage (which is pertinent to the threshold requirement of an "occurrence" to trigger coverage) and the insured's state of mind concerning the "discharge, dispersal, release, or escape" (which is pertinent to the "sudden and accidental" exception to the pollu-

tion exclusion). Here, the jury was asked both whether Broderick expected or intended the property damage and whether the release or escape of pollutants was sudden and accidental (correctly defined by the instructions as unexpected and unintended, see Hecla, 811 P.2d at 1092). Verdict, ¶¶ 1,2. The first question related to whether there had been an occurrence. See Pet. App. at 7a-9a. The second question related to application of the pollution exclusion clause. Broderick's argument rested on the jury's answer to the second question, not to the first.

Broderick's intent with respect to the exit of wastes from the ponds or plant equipment -- the "discharge, dispersal, release or escape" -- was an issue separate and distinct from Broderick's intent with respect to the subsequent groundwater contamination -- the "damage." For example, an insured who knows his ponds are leaking or who discharges directly into a stream, but honestly believes the wastes are harmless, would establish an "occurrence" (did not expect damage) but not coverage (discharge was expected or intended, not "sudden and accidental"). That was not this case or Broderick's argument. In relying on the jury's finding that the "release or escape of the chemicals into the ground water" was unexpected and unintended, Verdict ¶ 2A(ii), Broderick was addressing the issue as it related to the discharge and was not "attemp[ting] to graft an intent requirement related to damages" onto the pollution exclusion. Pet. App. at 12a (emphasis in original).[5]

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[5]Broderick's expectations and intent concerning, in the panel's words, the "second discharge" or the "subsequent release or escape", Pet. App. at 12a, are pertinent to applying the everyday meaning of "discharge, dispersal, release or escape." The jury's finding that the release or escape into the groundwater was sudden and accidental shows that the ponds were used to contain the wastes, supporting the conclusion that the placement of wastes in the ponds was not a "discharge, dispersal, release or escape" in the first place. See Sylvester Bros., 480 N.W.2d at 373.

II. The Court Of Appeals Had No Power To Direct Entry Of Judgment For Hartford As To Coverage For The Ponds.

The Tenth Circuit's choice of remedy plainly warrants this Court's review. The panel's direction of entry of judgment for Hartford on the issue of coverage for the containment ponds conflicts directly with this Court's precedent, and with that of the circuit courts.

1. The Seventh Amendment bars federal courts from re-examining facts found by a jury except as permitted at common law. U.S. Const. amend. VII. The procedure for seeking judgment n.o.v., codified in Rule 50(b), Fed.R.Civ.P., is constitutional because it is consistent with the procedures established at common law. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250 (1940). See also Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657-61 (1935); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377-400 (1913). Those procedures require a party who seeks to overturn a jury verdict to renew its motion for directed verdict at the close of all the evidence and to file a timely motion for judgment n.o.v.[6] Absent these motions, federal appellate courts have no power to direct the entry of judgment for the party that loses a jury verdict. Bogk v. Gassert, 149 U.S. 17, 23 (1893); Alston v. Bowins, 733 F.2d 161, 163-64 (D.C. Cir. 1984)(renewal of motion for directed verdict). Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217-18 (1947); Globe Liquor Co. v. San Roman, 332 U.S. 571, 573-74 (1948); Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48, 54 (1952); Home Ins. Co. of New York v. Davila, 212 F.2d 731, 733 (1st Cir. 1954)(judgment n.o.v.).

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[6]Rule 50, Fed.R.Civ.P., was amended effective December 1, 1991. The amendment deleted references to a motion for directed verdict and motion for judgment n.o.v., and adopted instead the phrase "motion for judgment as a matter of law." Fed.R.Civ.P. 50 (effective Dec. 1, 1991). The amendment did not alter the conceptual underpinnings of former Rule 50(b), in part to avoid any Seventh Amendment issue. Fed.R.Civ.P. 50 advisory committee's note, 1991 amendment, Subdivision (b). Because this case was tried in 1989, the terms "motion for directed verdict" and "motion for judgment n.o.v." then found in Rule 50(b) are applicable.

2. The court of appeals decision on rehearing concerning the main pond was a wholly impermissible attempt to sidestep these restrictions on its remedial powers. Apparently recognizing that it had no power to assess the sufficiency of the evidence concerning the cement lining in the main pond, the panel stated that it had not done so and that it had accepted the evidence as true. Pet. App. at 16a. The panel then held, without explanation, that "as a matter of law ---... when [Broderick] placed waste into the main pond, it discharged waste 'into or upon the land.'" Pet. App. at 16a.

The court's attempt to convert a factual issue (cement lining) into a legal one (interpretation of the exclusion) does not withstand scrutiny. If the court of appeals had accepted as true the evidence that the main pond was lined with cement, then as a matter of fact, the wastes were deposited "upon cement," not "upon land." This analysis would lead, as Broderick argued in its petition for rehearing, to affirmance, not reversal, of the verdict as to the main pond.[7]

Even if the panel was not persuaded that Broderick was entitled to affirmance, the most that Hartford could receive was a new trial; the panel had no power to direct entry of judgment for Hartford. Globe Liquor, 332 U.S. at 574; Johnson, 344 U.S. at 54. Accord Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1334 (10th Cir. 1984).

In sum, at a minimum, this Court should grant certiorari, reverse summarily the court of appeals direction of entry of judgment as to the ponds, and remand with directions that the new trial should include the issue of the application of the pollution exclusion to the containment ponds.

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[7]In the petition for rehearing, Broderick noted that the court had the power to affirm on any ground supported in the record and argued that even if the panel's interpretation of the exclusion were not changed, the panel should affirm the finding of coverage as to the main pond and the plant equipment. Although the Tenth Circuit may not have been persuaded, that fact did not expand its remedial powers -- the most that it could grant Hartford was a new trial; it could not direct entry of judgment in Hartford's favor.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 10, 1992

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER, as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,

Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,	)	
Plaintiffs-Appellees,	)	
v.	)	
	)	No. 90-1112
THE HARTFORD ACCIDENT & INDEMNITY COMPANY,	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 86-Z-1033)

[Filed January 8, 1992]

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Before **TACHA** and **SETH**, Circuit Judges, and **BRATTON**, District Judge.

TACHA, Circuit Judge.

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* The Honorable Howard C. Bratton, Senior District Judge for the United States District Court for the District of New Mexico, sitting by designation.

I. Introduction

This diversity action presents several questions concerning the availability of coverage under the Comprehensive General Liability (CGL) insurance policy for environmental response costs sought by the Environmental Protection Agency (EPA) pursuant to the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.[1]

On appeal, appellants challenge the district court's legal rulings on the following issues: (1) the interpretation of the term "occurrence" in the CGL policy; (2) the interpretation of the phrase "sudden and accidental" in the pollution exclusion clause; (3) the applicability of the pollution exclusion; (4) the interpretation of the term "damages"; (5) the interpretation of the "owned property" exclusion; and (6) the award of attorneys' fees in favor of the insured.

We review the district court's rulings on these questions of Colorado contract and insurance law de novo. Salve Regina College v. Russell, 111 S. Ct. 1217, 1221 (1991). We must interpret the insurance contract as a Colorado court would. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1937).

II. Factual Background

Broderick Wood Products, Inc. (BWP) was formed in 1946. Its founder, William Broderick, placed the stock in trusts administered by the Colorado National Bank of Denver and what is now the First Interstate Bank of Denver (collectively, the trustees). The company ceased operations in 1981 and was dissolved in 1982. Broderick Investment Company (BIC), a limited partnership whose general partners are the two bank trustees, succeeded to the company's rights and obligations.

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[1] Between 1971 and 1986, virtually all insurance companies issued an identical standard-form CGL insurance contract produced by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. Thus, the same contract language is at issue in nearly all insurance litigation pertaining to the years 1971 to 1986.

BWP's business involved pressure-treating wood products such as telephone poles and railroad ties with either creosote or penta-chlorophenol; steam-cleaning the impregnated wood; and disposing of the residue chemicals, oils, and water. BWP disposed of these waste materials into what today would be considered unlined pits located on the plant property. The waste materials were ninety-eight percent water, which was expected to evaporate and leave a sludge on the pit bottom.

By mid-1983, it was conclusively determined that contaminants from the pits were seeping into the soil and groundwater. The BWP facility was eventually added to the National Priorities List of hazardous waste sites under CERCLA. 49 Fed. Reg. 37070, 37085 (Sept. 21, 1984).

In April 1985, the EPA threatened to file a lawsuit against BIC and the trustees under CERCLA and RCRA unless the parties could agree to a consent decree. After several months of negotiations, the EPA and BIC agreed to a partial consent decree whereby BIC would pay for a study to investigate the contamination and possible solutions. On February 28, 1986, the EPA filed suit against BIC and the trustees, seeking recovery of environmental response costs incurred and to be incurred in association with the cleanup of the BWP facility.[2]

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[2] CERCLA identifies the owner or operator of a facility as a party potentially responsible for environmental response costs associated with the cleanup of that facility. 42 U.S.C. § 9607(a)(1). A facility's prior owner or operator may also be held liable if hazardous substances were disposed at the facility during that person's ownership or operation of the facility. 42 U.S.C. § 9607(a)(2). The EPA therefore sought recovery from BIC because it was both the current owner of the BWP facility and also the corporate successor to the facility's prior owner, BWP. See United States v. Carolina Transformer Co., Inc., 739 F. Supp. 1030, 1039 (E.D.N.C. 1989) (successor corporation liable under CERCLA if "substantial continuity" test satisfied).

CERCLA does not clearly define who may qualify as an owner or operator of a facility. See 42 U.S.C. § 9601(20)(A) (definition of "owner or operator"). Courts have held that a person who is directly

(continued...)

On June 6, 1986, one of the trustees' general liability carriers, United States Fidelity & Guaranty, filed this diversity action in the United States District Court for the District of Colorado, seeking a declaration that the CGL policies it had issued to the trustees provided no coverage for response costs sought by the EPA. The named defendants included BIC, the trustees, and other general liability carriers, including Hartford Accident & Indemnity Company. Hartford provided BWP with CGL policy coverage from 1976 until 1982 and insured BIC from 1982 until 1984. BWP'S prior insurers were either insolvent or unidentifiable. BIC cross-claimed against Hartford for coverage. Hartford counterclaimed for a declaration of no coverage and cross-claimed against the other carriers for contribution. BIC settled with the trustees' insurers prior to trial. The court then realigned the parties, naming BIC and the trustees as plaintiffs and Hartford as defendant.[3]

Prior to trial, the district court interpreted disputed terms of the CGL policy after receiving briefs, argument, and short evidentiary presentations concerning the intent of the policy drafters. The jury instructions and special verdict form reflected these legal rulings. The jury returned a verdict in favor of BIC based on the responses to the questions in the special verdict form.

Following the trial, the court awarded BIC attorneys' fees under the policy provision stating the insurer would pay "reasonable expenses incurred by the insured at the company's request in assisting the company in the investigation or defense of any claim or suit." The court

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[2](...continued)
involved in the management of a facility may be liable as an owner or operator. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985). Based on this construction, the EPA sought recovery against the trustees because they had served on BWP's board of directors, continually monitored BWP's performance, and made or reviewed the company's management decisions. The issue of BIC's successor liability is not before us.

[3] For the sake of clarity, the plaintiffs-appellees shall be collectively referred to as "BIC" throughout the remainder of this opinion.

also interpreted the 1983 policy to provide coverage of $3 million per occurrence and the other policies to provide coverage of $1 million per occurrence.

The CGL policy provides coverage for legal liability for damages imposed upon the insured as a result of an "occurrence." The policy defines an occurrence as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Assuming the insured's loss resulted from an occurrence, the insurer may avoid paying out on the policy if the event falls within the policy's pollution exclusion. This provision excludes coverage for damages "arising out of the discharge, dispersal, release or escape of . . . pollutants into or upon land." Coverage is restored, however, if "such discharge, dispersal, release or escape is sudden and accidental."

Because our decision necessarily would implicate unique matters of Colorado law and because the Colorado Supreme Court was in the process of addressing the CGL exclusion clause in a case before it, we waited to decide our case until the Colorado Supreme Court announced its decision. In Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991), the Colorado Supreme Court addressed the meaning of the phrase "property damage neither expected nor intended from the standpoint of the insured," which is part of the policy's definition of the term "occurrence." The court interpreted that phrase to exclude only property damages that "the insured knew would flow directly and immediately from its intentional act." Id. at 1088. The Colorado Supreme Court then addressed the meaning of the phrase "sudden and accidental." It construed "sudden and accidental" to mean unexpected and unintended. Id. at 1092.

Although the Hecla decision resolved some issues before this court, it left unresolved two critical issues that we must address -- namely, whether the placement of waste materials into containment ponds constituted a "discharge, dispersal, release or escape" and, if so, whether property damage could be said to arise out of this "discharge, dispersal, release or escape." Realizing that the resolution of these issues depended entirely on highly specific and complex matters of contract interpretation under Colorado law, we certified the following question to the Colorado Supreme Court:

> For purposes of interpreting a pollution exclusion in a comprehensive general liability policy, does the placement of industrial wastes into unlined storage pits when the insured did not intend third party damage to result constitute a "discharge, dispersal, release, or escape" within the meaning of the exclusion such that the damage can be said to "arise out of" the disposition of wastes in the pits?

The Colorado Supreme Court refused to answer the question.

> Therefore, we now must proceed to resolve these two unique and dispositive questions of state law as we believe the Colorado Supreme Court would. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and reverse.

III. The Interpretation of the Term "Occurrence" in the CGL Policy

Before addressing issues related to the pollution exclusion clause, we first examine the district court's jury instructions regarding whether there was an "occurrence." When reviewing a challenge to jury instructions, "we review the record as a whole to determine whether the instructions 'state the law which governs and provided the jury with an ample understanding of the issues and the standards applicable.'" Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1271 (10th Cir. 1988) (quoting Ramsey v. Culpepper, 738 F.2d 1092, 1098 (10th Cir. 1984)). The CGL policy provides coverage for legal liability for damages imposed upon the insured as a result of an "occurrence." The policy defines "occurrence" as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

To determine whether BIC is entitled to coverage for response costs, the jury was required to first determine whether there had been an occurrence. The district judge instructed the jury in the following manner:

> In order to establish that there is no coverage under its policies, defendant has the burden of proving by a preponderance of the evidence that plaintiffs expected or intended property damage, i.e. that plaintiffs expected or intended to contaminate groundwater or adjoining property. For purposes of this determination, it does not matter what another person might have expected or intended in similar circumstances. You must decide what plaintiffs actually expected or intended.
>
> One cannot, however, avoid the consequences of conduct from being expected or intended merely by choosing to ignore that which is obvious.

Based on the evidence at trial, the jury determined that BIC did not expect or intend the resulting contamination when it deposited the waste materials in the pits. It concluded there had been an occurrence within the meaning of the policy.

The instruction directing the jury to apply a subjective standard in determining whether BIC expected or intended the contamination resulting from its disposal practices is consistent with the Colorado Supreme Court's recent ruling in Hecla. In Hecla, the State of Colorado filed suit under CERCLA against Asarco, Inc., Resurrection Mining Company, and the Res-Asarco Joint Venture for response costs associated with damages resulting from the contamination of the California Gulch. This contamination occurred when Asarco employees removed shoring timbers and accumulated debris from a drainage tunnel, causing a surge of contaminated water. Id. at 1085.

The defendants filed a third-party complaint against Hecla Mining Company, a prior owner of a one-third interest in Resurrection. Hecla asked its insurance carriers to provide a defense. The insurance companies filed a declaratory judgment action and claimed they had no duty to defend or indemnify Hecla. They contended the contamination was a reasonably foreseeable result of the use of the drainage tunnel and therefore was not an "occurrence" under the terms of the CGL policy. Id. at 1087.

The Colorado Supreme Court rejected this argument. The court held that "the phrase 'neither expected nor intended' should be read only to exclude those damages that the insured knew would flow directly and immediately from its intentional act." Id. at 1088 (emphasis added) (citing City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d Cir. 1989)); see also Brooklyn Law Sch. v. Aetna Casualty & Sur. Co., 849 F.2d 788, 789 (2d Cir. 1988)). Because there was no evidence Hecla actually knew impounding water in the drainage tunnel would cause environmental damage, the court concluded the contamination "must be deemed an occurrence under the terms of the CGL policies." Id.

Based on this holding, we reject Hartford's argument that the district court erred in instructing the jury to apply a purely subjective standard in determining whether BIC expected or intended the contamination resulting from its disposal practices. Under Colorado law, environmental contamination constitutes an occurrence unless the evidence proves the insured in fact knew at the time that its practices would result in such damage. The district court properly assigned Hartford the burden of proving BIC knew its disposal practices would cause environmental damage. Because the district court properly instructed the jury, we do not disturb the jury's determination that there was an "occurrence."

IV. The Applicability of the Pollution Exclusion Clause

We must follow Colorado law when interpreting the CGL policy at issue in this case. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1937); City of Aurora v. Bechtel, 599 F.2d 382, 386 (10th Cir. 1979). Under Colorado law, the plain language of the contract controls, and a court cannot torture the plain language in order to create ambiguities. Chacon v. American Family Mut. Ins. Co., 788 P.2d 748 (Colo. 1990); Northern Ins. Co. v. Ekstrom, 784 P.2d 320, 322 (Colo. 1989). The Colorado Supreme Court has held that "[a] provision in a policy is ambiguous when it is reasonably susceptible to more than one meaning." Ekstrom, 784 P.2d at 323. Any ambiguities in a policy must be construed against the insurer. Further, when there are two or more reasonable interpretations of a clause, a court must adopt an interpretation that provides coverage. Chacon, 788 P.2d at 750; Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo. 1988). In summary,

"[t]o benefit from an exclusionary provision in a particular contract of insurance the insurer must establish that the exemption claimed applies in the particular case and that the exclusions are not subject to any other reasonable interpretations." American Family Mut. Ins. Co. v. Johnson, 816 P.2d 952, 953 (Colo. 1991) (citing Hecla, 811 P.2d at 1090).

On appeal, we must determine whether the pollution exclusion clause contained in the CGL policy relieves Hartford of its coverage obligations. The exclusion provision states,

> This insurance does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

On October 4, 1990, the district court ruled that the phrase "discharge, dispersal, release or escape" applied only to the seepage of chemicals from the holding pond into the groundwater, and not to the placement of wastes into the holding pond. Further, the jury instructions -- immediately after quoting the language of the exclusion -- provided that "[y]ou are instructed that the phrase 'discharge, dispersal, release or escape' applies to the entry of the chemicals into the groundwater." Finally, the jury verdict form focused only on the seepage of the toxic chemicals from the holding ponds into the groundwater.

We must determine whether the district court committed reversible error by instructing the jury to focus on the seepage from the holding ponds into the groundwater and by holding that the exclusion clause found in the CGL policy did not apply to the initial discharge. To make this determination, we must decide whether the initial placement of toxic chemicals into the holding ponds constituted a "discharge, dispersal, release or escape" into the land. Under Colorado law, we must construe these words according to their plain and ordinary meaning. "When determining the plain and ordinary meaning of words, defi-

nitions in a recognized dictionary may be considered." Hecla, 811 P.2d at 1091.

Relying on dictionary definitions, BIC contends that these four words generally imply liberation or freedom from confinement or restraint. BIC then argues that it intended to contain the wastes in the containment ponds, not to allow the wastes to seep into the groundwater. Because the pollution exclusion clause utilizes the word "or" to connect these four words, the exclusion is triggered if even one of the four words unambiguously describes BIC's placement of waste into the ponds. We conclude that, applying any reasonable interpretation, the phrase "discharge . . . into or upon the land" describes BIC's placement of waste into the ponds.

BIC urges that the term "discharge" may be interpreted reasonably to mean "to let go," "release from confinement" or "to give outlet to."[4] The term "discharge" does not stand alone in the policy and must be read in the context of the remainder of the language of the clause; most significantly, the term "discharge" precedes the phrase "into or upon the land." Even when we employ BIC's definitions in place of the word "discharge," we conclude that BIC discharged -- or "let go" or "released from confinement" -- the waste "into or upon the land."[5]

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[4] We note that, among many possible definitions, "discharge" may also be interpreted to mean "to send forth" or "to emit." See Compact Edition of the Oxford English Dictionary 740-41 (1985). These two definitions also support our interpretation of the exclusion clause.

[5] On appeal, BIC indirectly suggests that the phrase "into or on the land" does not describe their disposition of waste because one of the three containment ponds might have been lined with raw cement. As characterized by BIC, the evidence at trial indicated the following: that the pits were dug down to a natural clay layer; that the first pond was lined with two inches of raw cement; that although no one could testify with certainty that cement was placed in the bottom of the first pit, Forrest Dean testified that "he encountered a hard, impenetrable material on the bottom that was as hard as cement"; and that two of the three ponds were not lined with cement. BIC admitted that the pond

(continued...)

Because the containment ponds are land, any other interpretation of the phrase "discharge . . . into or upon the land" runs counter to common sense, plain meaning, and ordinary usage.

BIC argues that it intended to contain the waste in the ponds and that the subsequent release or escape that contaminated the groundwater was not intended or expected. With this argument, BIC tries to shift the focus to the second discharge and attempts to graft an intent requirement related to damages onto the unambiguous language of the policy's exclusion clause. However, whether BIC intended the waste to seep into groundwater and cause damage after the initial discharges into the land is not relevant. "[T]he pollution exclusion clause focuses on whether the discharge of pollution was unexpected and unintended." Hecla, 811 P.2d at 1088 n.7 (emphasis added). We cannot torture the unambiguous language of the exclusion provision in order to create an intent requirement that applies to the damage caused by the pollutants.

Because we conclude that BIC discharged its waste into the land, we must decide whether the property damage arose out of that discharge. In Azar v. Employers Casualty Co., 495 P.2d 554, 555 (Colo. 1972), the Colorado Supreme Court defined "arising out of" to mean "originate from," "grow out of" or "flow from." The Colorado Supreme Court has stated that "[w]e see no reason to give 'arising out of' a different meaning in the context of a policy exclusion." Northern Ins. Co. v. Ekstrom, 784 P.2d 320, 323 (Colo. 1989). Whether the phrase "arising out of" in an insurance exclusion clause bars coverage is determined under a "but for" analysis. See Titan Constr. Co. v. Nolf, 515 P.2d 1123, 1126 (Colo. 1973). Given the facts in this case, we conclude that the contamination of the groundwater could not have occurred but for BIC's discharge into the holding ponds. Without the discharge into the holding ponds, the resulting groundwater contamina-

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[5](...continued)
was unlined as measured by today's EPA standards. In its supplemental brief, BIC asserted that "[t]he main pond was at best partially, and probably entirely, lined with raw cement." Even when we view the evidence in a light most favorable to BIC and adopt BIC's characterizations as true, we nevertheless conclude that the disposition of the waste was "into or upon the land."

tion simply would not have developed. Thus, the property damage originated from, grew out of, and flowed from BIC's discharge of toxic chemicals into the holding ponds.

Under the exclusion clause, coverage is restored if the discharge was "sudden and accidental." The Colorado Supreme Court recently stated that the term "sudden and accidental" is ambiguous and must be construed in favor of the insured to mean "unexpected and unintended." See Hecla, 811 P.2d at 1092. Employing this construction, we conclude that the record shows that the initial discharge into the ponds was not "sudden and accidental." BIC admits that it intended to discharge the toxic chemicals into the ponds and that such a discharge was not unexpected. Therefore, we conclude that the pollution exclusion clause applies and the property damage arising out of BIC's discharge into the land is not covered under the unambiguous terms of the CGL policy. This conclusion makes it unnecessary for us to reach the remainder of Hartford's contentions on appeal.

In making this determination, we emphasize that our reasoning and interpretation are governed by Colorado law. We can only analyze the CGL policy as we think the Colorado Supreme Court would have done had they accepted our certification. The parties and the amicus curiae briefs raise extremely important policy concerns regarding the interpretation of the CGL exclusion clause. However, under Colorado law, we must confine our analysis of the exclusion clause to the plain language of the contract. We conclude that the language is clear and unambiguous.

Accordingly, we **REVERSE** the judgment of the district court and **REMAND** to the district court with the direction that judgment be entered in favor of Hartford.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,	)	
Plaintiffs-Appellees,	)	
v.	)	
THE HARTFORD ACCIDENT & INDEMNITY COMPANY,	)	No. 90-1112
Defendant-Appellant.	)	

ORDER ON REHEARING

[Filed April 15, 1992]

Before **TACHA** and **SETH**, Circuit Judges, and **BRATTON**, District Judge.*

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* The Honorable Howard C. Bratton, Senior District Judge for the United States District Court for the District of New Mexico, sitting by designation.

Plaintiffs-Appellees' petition for rehearing is granted by the panel of judges who decided this appeal on the merits. On rehearing, we consider only the issue of whether Broderick Investment Company (BIC) is entitled to coverage for two sources of pollution, the "main pond" and the "plant equipment." In its petition for rehearing, BIC contends that "[t]he proper course -- if the panel's opinion is not otherwise modified -- is to affirm the finding of coverage as to those two sources and remand for a determination of this allocation" (footnote omitted). We disagree.

With regard to the "main pond," we stated in footnote five of our opinion that:

> BIC indirectly suggests that the phrase "into or upon the land" does not describe their disposition of waste because one of the three containment ponds might have been lined with raw cement. As characterized by BIC, the evidence at trial indicated the following: that the pits were dug down to a natural clay layer; that the first pond was lined with two inches of raw cement; that although no one could testify with certainty that cement was placed in the bottom of the first pit, Forrest Dean testified that "he encountered a hard, impenetrable material on the bottom that was as hard as cement"; and that two of the three ponds were not lined with cement. BIC admitted that the pond was unlined as measured by today's EPA standards. In its supplemental brief, BIC asserted that "[t]he main pond was at best partially, and

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* The Honorable Howard C. Bratton, Senior District Judge for the United States District Court for the District of New Mexico, sitting by designation.

> probably entirely, lined with raw cement."[6] Even when we view the evidence in a light most favorable to BIC and adopt BIC's characterizations as true, we nevertheless conclude that the disposition of the waste was "into or upon the land."

BIC contends that when we made this statement, we were reviewing the "sufficiency of the evidence concerning the cement lining of the main pond." This simply is incorrect. We reemphasize that we adopted all of BIC's characterizations of the evidence as true. We then concluded -- as a matter of law -- that when BIC placed waste into the main pond, it discharged waste "into or upon the land." We recognize that BIC argues that it intended to contain the waste in the pond. This argument misses the point: BIC still intended to contain the waste in the land. Thus, BIC discharged waste into the land and is not entitled to coverage for any damage that emanated from its discharge of waste into the main pond or any of the other ponds.

Turning to whether BIC is entitled to coverage for the "plant equipment," we begin by examining the district court's instruction regarding the exclusion clause. After quoting the exclusion clause, the district court's instruction stated that "[y]ou are instructed that the phrase 'discharge, dispersal, release or escape' applies to the entry of the chemicals into the groundwater." The jury verdict form also incorrectly focused on the release of toxic chemicals into the groundwater. As we concluded in our earlier opinion, the instruction and the jury verdict form were improper. We cannot accept the jury's finding of coverage with regard to the "plant equipment." Instead, we must remand to the district court for a new trial to determine whether coverage exists for the contamination caused by waste that emanated from the "plant equipment" and for further proceedings consistent with this opinion.

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[6] BIC subsequently corrected this sentence to read "[t]he main pond was at least partially, and probably entirely, lined with raw cement." This change in no way affects our analysis because, for purposes of resolving this appeal, we accepted BIC's version of the evidence as true.

Therefore, we now vacate the last sentence of our earlier opinion and substitute the following: "Accordingly, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion."

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

BIC's motion for recertification to the Colorado Supreme Court also is denied.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; FIRST INTERSTATE BANK N.A., as trustee, COLORADO NATIONAL BANK, as trustee	)	
Plaintiffs - Appellees,	)	
v.	)	No. 90-1112
	)	(D.C. No. 86-Z-1033)
HARTFORD ACCIDENT & INDEMNITY COMPANY,	)	
Defendant - Appellant,	)	
	)	
INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION; STATE OF COLORADO; AMERICAN FIBER MANUFACTURERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; THE CHEMICAL MANUFACTURERS ASSOCIATION; COLORADO MINING ASSOCIATION; ALLIED-SIGNAL, INC.; INTERNATIONAL BUSINESS MACHINES CORPORATION; OLIN CORPORATION,	)	
Amici Curiae.	)	

JUDGMENT
Entered January 8, 1992

Before TACHA and SETH, Circuit Judges, and BRATTON*, District Judge.

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*The Honorable Howard C. Bratton, Senior District Judge for the United States District Court for the District of New Mexico, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The case is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

Entered for the Court
ROBERT L. HOECKER, Clerk

By:
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER, as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 90-1112
THE HARTFORD ACCIDENT & INDEMNITY COMPANY,	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 86-Z-1033)

[Filed August 13, 1991]

Before **TACHA** and **SETH**, Circuit Judges, and **BRATTON**, District Judge.*

CERTIFICATION OF QUESTION OF STATE LAW

The United States Court of Appeals for the Tenth Circuit, pursuant to Colo. App. R. 21.1, hereby certifies to the Supreme Court

of the State of Colorado the following question of Colorado law which may be determinative of the above-captioned matter now pending before the Tenth Circuit Court of Appeals but does not appear to be answered in the decisions of the Supreme Court of Colorado:

For purposes of interpreting a pollution exclusion in a comprehensive general liability policy, does the placement of industrial wastes into unlined storage pits when the insured did not intend third party damage to result constitute a "discharge, dispersal, release, or escape" within the meaning of the exclusion such that the damage can be said to "arise out of" the disposition of wastes in the pits?

I. Factual Background

Broderick Wood Products, Inc. (BIC) was formed in 1946. Its founder, William Broderick, placed the company's stock in trusts administered by the Colorado National Bank of Denver and what is now the First Interstate Bank of Denver (collectively, the Trustees). BIC's business involved pressure-treating wood products such as telephone poles and railroad ties with either creosote or pentachlorophenol; steam-cleaning the impregnated wood; and disposing of the residue chemicals, oils, and water. BIC disposed of these waste materials into what would today be considered unlined pits located on the plant property. The waste materials were ninety-eight percent water, which was expected to evaporate, leaving a sludge on the pit bottom.

The company ceased operations in 1981 and was dissolved in 1982. Broderick Investment Company (BIC), a limited partnership whose general partners are the two bank Trustees, immediately succeeded to the company's rights and obligations.

By mid-1983, it was conclusively determined that contaminants from the pits were seeping into the soil and groundwater. The BIC facility eventually was added to the National Priorities List of hazardous waste sites. 49 Fed. Reg. 3707ᴖ, 37085 (Sept. 21, 1984). In April 1985, the Environmental Protection Agency (EPA) threatened to file a

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* Howard C. Bratton, Senior District Judge of the United States District Court for the District of New Mexico, sitting by designation.

lawsuit against BIC and the Trustees under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., and the Resource Conservation Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., unless the parties could agree to a consent decree. After several months of negotiations, the EPA, BIC, and the Trustees agreed to a partial consent decree whereby BIC and the Trustees would pay for a study to investigate the contamination and possible solutions. On February 28, 1986, the EPA filed suit against BIC and the Trustees, seeking recovery of environmental response costs incurred and to be incurred in association with the BIC facility.

On June 6, 1986, one of the Trustees' general liability carriers, United States Fidelity & Guaranty, filed this diversity action in the United States District Court for the District of Colorado, seeking a declaration that the Comprehensive General Liability (CGL) policies it had issued to the Trustees provided no coverage for response costs sought by the EPA. The named defendants included BIC, the Trustees, and other general liability carriers, including Hartford Accident & Indemnity Company. Hartford provided BIC with CGL policy coverage from 1976 until 1982 and insured BIC from 1982 until 1984. BIC's prior insurers were either insolvent or unidentifiable. BIC cross-claimed against Hartford for coverage. Hartford counterclaimed for a declaration of no coverage and cross-claimed against the other carriers for contribution. The Trustees' insurers settled prior to trial. The court then realigned the parties, naming BIC and the Trustees as plaintiffs and Hartford as defendant.[7]

Prior to trial, the district court interpreted disputed terms of the CGL policy after receiving briefs, argument, and short evidentiary presentations concerning the intent of the policy drafters. The jury instructions and special verdict form reflected these legal rulings. The jury returned a verdict in favor of BIC based on the responses to the questions in the special verdict form.

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[7] For the sake of clarity, the plaintiffs-appellants and BIC shall be collectively referred to as "BIC" throughout the remainder of this certification.

Hartford filed a timely notice of appeal with the Tenth Circuit Court of Appeals challenging several legal rulings by the district court, including: (1) the interpretation of the term "occurrence" in the CGL policy, (2) the interpretation of the phrase "sudden and accidental" in the pollution exclusion clause, (3) the applicability of the pollution exclusion clause, (4) the interpretation of the term "damages," (5) the interpretation of the "owned property" exclusion, and (6) the award of attorneys' fees. We are unable to discern from Colorado law the proper resolution of the question whether the pollution exclusion clause precludes coverage. Controlling decisions of the Colorado courts on related questions do not provide sufficient guidance.

II. Applicability Of the Pollution Exclusion Clause

The CGL policy provides coverage for legal liability for damages imposed upon the insured as a result of an "occurrence." The policy defines an occurrence as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Assuming the insured's loss resulted from an occurrence, the insurer may avoid paying out on the policy if the event falls within the policy's pollution exclusion. This provision excludes coverage for damages "arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water." Coverage is available, however, "if such discharge, dispersal, release or escape is sudden and accidental."

There are two events in this case to which the "arising out of" phrase in the exclusion might apply: the initial, intentional placement of wastes into the pits and the later, unexpected and unintended seepage of wastes into the groundwater. If the damage arose out of the initial placement, the pollution exclusion bars coverage for such intentional acts. If the damage arose from the seepage, however, the exclusion would not bar coverage because the seepage was sudden and accidental and therefore falls within the exclusion's exception. In the present case, the district court ruled the pollution exclusion applied to the seepage of wastes.

Hartford contends the property damage arose out of BIC's initial placement of wastes. This argument is supported by a line of Colorado Supreme Court decisions construing the phrase "arising out of" in a policy exclusion to mean "originate from," "grow out of," or "flow from." See, e.g., Northern Ins. Co. v. Ekstrom, 784 P.2d 320 (Colo. 1989); Titan Constr. Co. v. Nolf, 515 P.2d 1123 (Colo. 1973). The test for whether damages arose out of an incident asks whether the loss would have occurred but for that incident. Ekstrom, 784 P.2d at 323. In Titan, the court explained this "but for" test does not contain a strict concept of proximate causation. 515 P.2d at 1126. Rather, the court held "the sufficiency of the causative relationship must be . . . [determined] on an ad hoc basis." Id.

Neither Titan nor Ekstrom provide adequate factual analogs to guide our determination of whether the damages arose out of the initial placement of wastes into the pits or the later seepage. In Titan, the driver of a truck who was offloading wet grout into a hopper injured an insured. Because the capacity of the hopper was substantially less than that of the truck, the driver had to wait until the hopper was empty and then refill it. 515 P.2d at 1124. While waiting for the hopper to empty, the driver dislodged a brick that fell and struck the insured. The policy covered injuries arising out of the use, including loading and unloading, of any automobile. Id. The court decided the unloading was ongoing, though intermittent, and that the accident arose out of the unloading. Id. at 1125. In this context, the court held the injury was covered because it would not have occurred but for the unloading.

In Ekstrom, the court held a CGL policy exclusion for injuries arising out of use or ownership of an automobile barred coverage for injuries due to negligent entrustment of a truck. 784 P.2d at 323. The plaintiff claimed the truck's owner was responsible for injuries sustained when the driver, an employee of the owner, struck her vehicle. She argued both the negligent operation and negligent entrustment of the truck caused her injuries, and that the negligence of the owner was a separate and independent cause of her injuries not excluded by the policy. Id. The court held that "[w]here multiple causes of injury are alleged, a claim is barred by the automobile exclusion unless it arises from non-automobile related conduct and is independent of any ownership, operation, or use of an automobile." Id. The court found that negligent entrustment of an automobile entails ownership, operation, or

use of an automobile, so there was no coverage under the CGL policy. Id. at 324.

Hartford argues that but for BIC's placement of wastes in the containment pits, the contamination would not have occurred. Hartford's position would have us analogize the initial placement to the negligent entrustment in Ekstrom and the later seepage to the negligent driving. Relying on Titan to support its argument, Hartford would have us discount the proximate cause of seepage from the pits and look to the disposal in the pits as the ultimate cause of damage. Because the damage can be traced to this intentional act, Hartford argues, there is no coverage.

BIC argues the damage arose out of the seepage. BIC apparently would distinguish its disposal practices from the negligent entrustment of the vehicle in Ekstrom and have us hold the initial placement in no sense caused third party damage. BIC asserts only the seepage can unambiguously be characterized as the type of "discharge, dispersal, release or escape" barred by the pollution exclusion. If the pollution exclusion reference to a "discharge, dispersal, release or escape" does not unambiguously describe BIC's placement of wastes into the pits, the pollution exclusion arguably would not bar coverage. See, e.g., Lister v. American United Life Ins. Co., 797 P.2d 832, 733 (Colo. App. 1990) (ambiguities in limitations of coverage must be construed in favor of coverage); State Compensation Ins. Fund v. Wangerin, 736 P.2d 1246, 1248 (Colo. App. 1986) (same).

The jury found BIC did not intend any property damage when it placed its wastes in the pits.[8] The jury's finding implicitly supports BIC's contention that BIC did not intend the wastes to migrate. This, in turn, indicates BIC's intentional placement of wastes into the pit was not necessarily the activity contemplated by the pollution exclusion. That clause speaks of a "discharge" in the context of a "dispersal, release, or

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[8] We recognize this finding is distinct from the question whether the pollution exclusion analysis should focus on BIC's placement of the wastes into the ponds or the waste's later seepage from the ponds. See Hecla Mining Co. v. New Hampshire Ins. Co., No. 89SC646, slip op. at 13 n.7 (Colo. May 13, 1991) (en banc).

escape," thus reasonably signifying a final relinquishment of the wastes. Cf. Ekstrom, 784 P.2d at 323 ("A provision in a policy is ambiguous when it is reasonably susceptible to more than one meaning."). The record adequately supports the jury's implicit finding that BIC did not view its disposal practices as this sort of final relinquishment or abandonment of responsibility for the wastes, but rather as storage. Hence, BIC may reasonably have expected the disposal/storage method was not a "discharge, dispersal, release, or escape" for purposes of the pollution exclusion. BIC insists Colorado law prescribes coverage in this situation.[9] See, e.g., Chacon v. American Family Mut. Ins. Co., 788 P.2d 748, 750 (Colo. 1990) (any ambiguities in policy must be construed against insurer; when two reasonable interpretations of provision possible, court must adopt interpretation that provides coverage); Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo. 1988) (same).

III. Certification

Because Colorado case law does not indicate the proper interpretation of the phrases "arising out of" and "discharge, dispersal, release or escape" in the pollution exclusion of the CGL policy and because of the importance of this issue, we respectfully request the Colorado Supreme Court to address the aforementioned question of Colorado law.

The clerk of this court will transmit copies of this certification order to counsel for all parties to the proceedings in this court. The clerk will also submit to the Supreme Court of the State of Colorado a certified copy of this order, together with copies of the briefs filed with this court and either the original or a copy of the district court record

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[9] The jury's finding of no intent to harm third party property also indicates the seepage was an unexpected and unintended "discharge, dispersal, release or escape." In addressing the meaning of the phrase "sudden and accidental" in the pollution exclusion, the Colorado Supreme Court has held damages from such pollution is not barred from coverage. Hecla, No. 89SC646, slip op. at 21.

filed with this court. Pursuant to Colo. App. R. 21.1(e), the fees and costs of this certification shall be divided equally among the parties.

Dated this 13th day of August, 1991.

/s/ Deanell Reece Tacha
Deanell Reece Tacha
Circuit Judge

SUPREME COURT, STATE OF COLORADO
CASE NO. 91SA314
CERTIFICATION OF QUESTION OF LAW
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT NO. 90-1112

ORDER OF COURT

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER, as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,

Plaintiffs-Appellants,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,

Defendant-Appellee.

Upon consideration of the Certification of Question of State Law filed in the above cause, and now being sufficiently advised in the premises,

The Supreme Court DECLINES to answer the Question.

BY THE COURT, EN BANC, SEPTEMBER 12, 1991.

cc:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-1033

BRODERICK INVESTMENT COMPANY, et al.,

Plaintiffs,

vs.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Defendant.

REPORTER'S TRANSCRIPT
(Motions Hearing: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 4:50 p.m., on the 4th day of October, 1989, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

HOLLAND AND HART, by R. BROOKE JACKSON and ANNE STARK, Attorneys at Law, Suite 2900, 555 17th Street, Denver, Colorado, 80202, and EUGENE ANDERSON and NICHOLAS K. ZOOGMAN, Anderson, Kill, Olick, Oshinsky, 666 3d Avenue, New York, New York, 10017, appearing for the plaintiffs.

PRYOR, CARNEY AND JOHNSON, by THOMAS L. ROBERTS, SUSAN T. SMITH, AND JOANNE M. ZBOYAN; Attorneys at Law, 6200 South Proceedings Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado 80294, (303) 629-9285 Syracuse Way, Suite 400, Englewood, Colorado, 80111, appearing for the defendant.

* * * * *

(The following proceedings were had and entered of record after the Court heard evidence and the arguments of Counsel on October 2, 3, and 4, 1989:)

RULING

THE COURT: Actually, I think the pollution exclusion issue for me is one of the easiest things to do decide (sic) at this point, so let me take that first.

Yes, it is ambiguous. Yes, it must be resolved for the insured. Yes, there are lots of statements at the time that really didn't change anything, and that was because as stated in the letter just referred to, the drafters were saying that most pollution wasn't covered because most

pollution was intended or expected and thus was not covered under the occurrence paragraph.

It is clear that the word "sudden" has different meanings besides quick or besides a temporal meaning; and the meanings that have been evident in these various documents and in letters and briefs and depositions and in the dictionary are meanings such as unforeseen, unexpected, unprepared for, without prior warning: the unexpected, unintended, unforeseen sort of trilogy. And if the exclusion provision must be interpreted and is ambiguous, as I think it clearly is, and must be interpreted favorably for the insured, then it will not be given its temporal meaning. It will be given the broader meaning of unintended, unexpected, unforeseen, without warning, the various things that we've seen in the documents, which also goes along with the documents that indicate to West Virginia and New York and some of the other jurisdictions that this was no great change in the policy; that really this was just making clear what was previously stated by way of intent, and that was that expected and intended pollution would not be covered under the occurrence clause.

So my ruling on pollution exclusion, on the exception, is now much more specific then just denying a motion for summary judgment and

saying that there is--are factual issues. My ruling is that because the clause is ambiguous, because it must be construed and resolved for the insured, that it will be interpreted in the broader way for the jury; and that is that it was not meant to be a whole new ballgame but it was meant to cover discharge, dispersal, release, escape which is sudden and accidental, meaning unintended, unforeseen, unexpected discharge. And we're talking about the discharge from the holding pond into the ground water. We're talking about the discharge from the plant, if there was some, into the ground water, which would affect third parties, which would affect the ground water, wildlife, and other third parties on other property.

And indeed, this leads us into the owned property exclusion. It's very clear if it's necessary to clean up the owner's property in order to protect others and protect the ground water and protect the wildlife, then that latter protection is primary and the fact that you have to clean up the owner's property in order to protect others--that's sorts of a byproduct or secondary. And indeed, if it is necessary clean up of the owner's property which has nothing to do with protection of others, with protection of other property owners or ground water or wildlife, then that is not covered. And if the facts show that there is some of that

in the case, that certainly is not within the policy and the Court is not going to--I think that could probably be ruled on an a matter of law, unless there is a factual dispute and the fact-finder has to decide that.

. . . .

MR. ROBERTS: I just wanted to ask for a clarification,

Judge, on the second part of your pollution exclusion ruling. I think I got the sense of it, but it was a little unclear to me when you stated it about the release or the discharge.

THE COURT: Well, I think that's just a question of looking at the words in the contract. We are talking about discharge, dispersal, release, or escape to third parties in this case. We're not talking about dispersal into a pond. We're talking about whether dispersal or escape from the pond--or I think someone for the plaintiff, maybe Mr. Jackson, said it came from the plant, too. I really wasn't aware of that--to third parties through ground water or through damage to wildlife or through injury to other people, maybe neighbors--whether that dispersal, release, escape, is sudden and accidental. That's what we're talking about.

MR. ROBERTS: Okay.

THE COURT: So I'm agreeing with the plaintiff on what we're talking about when you mean discharge, dispersal, release or escape. It has to be that.

MR. ROBERTS: That's what I thought you said but I just wanted to be clear.

THE COURT: Okay I think that's the only logical way to go.

. . . .

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C.A. § 1652 (1966)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Fed.R.Civ.P. 50(b) (1989)

Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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No. 92-0092

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRODERICK INVESTMENT COMPANY,
a partnership and successor to
Broderick Wood Products, Inc., *et al.*,
Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. On the facts of this diversity case, did the court of appeals correctly apply state contract law in holding that the "pollution exclusion" in the insurance policies at issue excludes coverage for property damage arising out of Broderick's industrial practice of continuous and deliberate discharges of toxic wastes into and onto its land for 35 years?

2. Did the court of appeals act within its power in reversing the judgment for petitioners and holding as a matter of law on the facts of this case that the pollution exclusion bars coverage of most of Broderick's toxic waste discharges?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-0092

BRODERICK INVESTMENT COMPANY,
a partnership and successor to
Broderick Wood Products, Inc., *et al.*,
Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion and order on rehearing of the United States Court of Appeals for the Tenth Circuit is reported at 954 F.2d 601 (10th Cir. 1992) and is reprinted in the Appendix to the petition for a writ of certiorari at 1a-17a. The court's judgment entered January 8, 1992, is reprinted in the Appendix at 18a-19a. The Court of Appeals' Certification Of Question of State Law, filed on August 13, 1991, is included in the Appendix at 20a-27a. The order

of the Colorado Supreme Court declining certification of the question is reprinted in the Appendix at 28a-30a.

The bench ruling of the United States District Court for the District of Colorado (Weinshienk, J.) is not reported. A transcript of the proceeding is reprinted in the Appendix at 31a-36a.

JURISDICTION

This action was brought in the United States District Court for the District of Colorado under 28 U.S.C. § 1332(a)(1). On March 16, 1990, the district court entered judgment for petitioners under Federal Rule of Civil Procedure 58. On January 8, 1992, the Tenth Circuit issued its decision reversing the judgment. On April 15, 1992, the Tenth Circuit entered an order granting, in part, and denying, in part, petitioners' petition for rehearing, rejecting their suggestion for rehearing en banc, reversing the judgment, and remanding the case for further proceedings. 954 F.2d at 608. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Broderick Investment Company is the successor of Broderick Wood Products, Inc. (Broderick), which was formed in 1946. 954 F.2d at 603. Broderick's business involved pressure-treating wood products such as telephone poles and railroad ties with toxic chemicals, steam-cleaning the impregnated wood, and disposing of the residue chemicals, oils, and water. *Id.* For more than 35 years beginning in 1946, Broderick routinely discharged millions of gallons of untreated toxic waste onto its land by piping it into three pits dug into the ground (euphemistically referred to by Broderick as "containment ponds"). *Id.*; R. Vol. VIII at 1248-49, 1254, 1305-08, 1325, 1367-68. The parties disputed whether the sides of the main pit were partially lined with cement, but Broderick conceded that the other two pits were unlined

pits dug into the highly permeable, sandy soil below the level of the groundwater.[1] Exhs. 5, BC & BD; R. Vol. VIII at 1248-49 & 1254, 1305-08, 1325, 1367-68.

Broderick knew that its toxic waste was harmful to wildlife [R. Vol. II at 250, 253-54, 279; R. Vol. III at 406; R. Vol. V at 661; R. Vol. VI at 850-51, 915-17], that the soil was highly permeable, and that the groundwater was very close to the surface [R. Vol. II at 265-66, 272, 274-77; R. Vol. III at 300-01, 447; R. Vol. V at 735-37; R. Vol. VI at 841-43, 852-53, 857, 873, 904-07, 954; R. Vol. VIII at 1266-77, 1325]. Broderick let freshly treated wood products dry by allowing toxic wastes to discharge directly onto the land from rail cars on the "drip tracks." R. Vol. III at 438; R. Vol. VIII at 1265-66; Ex. BD. Broderick employees even spread the sludge dredged out of the main pit around the property to kill weeds. R. Vol. II at 250-52, 300-01; R. Vol. VI at 856 & 860-61; R. Vol. VI at 922.

Broderick stubbornly disregarded all evidence of its pollution until 1981—when the Environmental Protection Agency (EPA) first inspected the site. By mid-1983, the EPA conclusively determined that contaminates from Broderick's pits were flowing into the soil and groundwater. 954 F.2d at 603. As a result of the EPA's action, Broderick entered into a consent decree requiring investigation and, ultimately, remediation of the site. 954 F.2d at 603-04.

Having saved the overhead costs of disposing of its toxic wastes responsibly, Broderick demanded that its liability insurance carriers, including Hartford, pay for the

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[1] Broderick's characterization of the main pit as a cement-lined containment pond is a mischaracterization of fact. Broderick filed reports to the EPA describing *all* the pits on the property as *unlined* (Exs. E at 19, AG, BC & BD), and according to one employee, the main pit was not lined (R. Vol. VI at 845-46 & 859). In any event, the court of appeals adopted as true Broderick's characterization of the main pit as partially cement-lined.2 954 F.2d at 608.

resulting environmental damages. *Id.* at 604. A declaratory judgment action was filed in the district court to determine whether the Comprehensive General Liability (CGL) policies, including those issued by Hartford for years 1976 through 1984, provided Broderick with coverage for environmental response costs incurred by the EPA in cleaning up the facility. *Id.* at 606. Each CGL policy, however, contained a "pollution exclusion" clause plainly stating that the policy did not cover property damage "arising out of" the "discharge, dispersal, release, or escape" of "toxic chemicals . . . waste materials or other . . . pollutants into or upon the land" unless the discharge is both "sudden and accidental." *Id.* Since Broderick routinely and deliberately dumped toxic chemicals onto the land, Hartford argued that those discharges into and upon the land were neither sudden nor accidental. *Id.* at 606.

The district court, however, instructed the jury that the phrase "discharge, dispersal, release or escape" applied only to the entry of toxic chemicals into the groundwater, and did not apply to the initial discharge of toxic chemicals into the pits, so that unless Broderick expected or intended to contaminate the groundwater or the adjoining property, the pollution exclusion did not bar coverage. On the basis of these instructions, the jury returned a verdict for Broderick. *Id.* at 606.

The Tenth Circuit reversed, holding that the instructions were erroneous because "under any reasonable interpretation" of the policy, the phrase "discharge . . . into or upon the land" described Broderick's initial placement of toxic wastes into the pits. The court also ruled that the exception to the pollution exclusion did not apply because the *discharge* of pollutants by Broderick into and onto the land was neither "sudden" nor "accidental." While following Colorado law which interprets the word "sudden" favorably to insureds to mean "unintended or unexpected," the court of appeals nevertheless held that

Broderick's deliberate discharge of the chemicals into the earthen pits was not unintended or unexpected. "Therefore," the Tenth Circuit concluded, "the pollution exclusion clause applies and the property damage arising out of [Broderick's] discharge into the land is not covered under the unambiguous terms of the CGL policy." [2] *Id.* at 608.

REASONS FOR DENYING THE WRIT

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Petitioners forget that this Court's primary function is to resolve questions of broad precedential value, not to correct error. Petitioners have utterly failed to identify any important reasons for this Court to review any issue presented here. This fact-bound case involving state law issues of contract interpretation does not present an issue of federal law, a conflict of law among the circuit courts, or any other reason supporting Supreme Court review, compelling or otherwise. The court of appeals merely carried out its duty to determine state law issues de novo, and it did so correctly. But even if it were wrong, petitioners' mere disagreement with the Tenth Circuit's opinion does not warrant Supreme Court review. The petition for a writ of certiorari should be denied.

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[2] On petitioners' petition for rehearing, the court of appeals reversed the judgment and remanded the case to determine whether the pollution exclusion precluded coverage for contamination caused by toxic waste that emanated from "plant equipment," and for other proceedings consistent with its opinion. 954 F.2d at 608-09. This modification of the judgment caused four issues raised by Hartford on appeal to become ripe for determination, but, over Hartford's objection, the court refused to rule on them.

I. THE TENTH CIRCUIT'S RULING DOES NOT WARRANT SUPREME COURT REVIEW BECAUSE IT INVOLVED A CONTROLLING QUESTION OF STATE LAW, AND ITS APPLICATION OF STATE LAW IN THE CIRCUMSTANCES OF THIS CASE WAS MANIFESTLY CORRECT

This Court has long instructed that "state law determinations by the Court of Appeals will rarely constitute an appropriate subject" for Supreme Court review. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Indeed, this Court pays "great deference" to the views of the lower federal courts on controlling issues of state law, and "is hesitant to overrule decisions by the federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976). The sole dispute in this diversity jurisdiction case concerned the proper interpretation of the pollution exclusion under Colorado law. Petitioners have not identified any important question of federal law or any issue in conflict with the rulings of other courts that would support their request for certiorari. *See* Sup. Ct. Rule 10.

Petitioners assert (Pet. at 10) that this Court should grant certiorari and provide a uniform interpretation of the law of the various states on the pollution exclusion to prevent forum shopping. But that contention is meritless—it is not the role of this Court to create federal common law to bring uniformity to the laws of the various states. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). Issues of contract interpretation, insurance or otherwise, are uniquely matters of individual states' laws.[3] The Tenth Circuit's ruling on this controlling issue of Colorado law is not appropriate for Supreme Court review.

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[3] Furthermore, choice of law principles preclude any real concern with forum shopping in any case, and that is especially true here: the insured was domiciled in Colorado, the dump site was located in Colorado, and the policy was issued in Colorado.

In any event, the court of appeals was correct in holding that the pollution exclusion precludes coverage for property damage arising from Broderick's intentional discharge of toxic wastes. Although the Court gets no hint of it from the petition, the undisputed evidence is that for 35 years Broderick engaged in the regular and nonsudden discharge of toxic waste into and onto the land at its wood treatment facility.[4] Contrary to petitioners' assertion (Pet. at 9-10), the overwhelming weight of authority from state to state and circuit to circuit, in trial and appellate courts alike, has interpreted the pollution exclusion precisely as did the Tenth Circuit here—to preclude coverage of property damage arising out of the regular and routine discharge of toxic wastes by the insured onto its land, even where toxic chemicals gradually and unexpectedly percolate through the ground and contaminate groundwater.[5] Obviously, as the courts recog-

[4] Petitioners' experts admitted at trial that when Broderick discharged its waste water it was putting chemicals "into or onto" the land and that the damage to the groundwater at the Broderick site resulted from these toxic discharges. This was also conceded to be a regular and deliberate business practice, not an accidental release. Transcript of October 2, 1989, hearing at 89-90; R. Vol. II at 142; R. Vol. III at 461-63; R. Vol. IV at 530-532, 535-36; R. Vol. V. at 788-89, 797-98 & 802-03. In fact, petitioners' counsel conceded at the hearing that if continuous discharge into the land could not be considered "sudden and accidental," then the pollution exclusion "knocked them out of the box." Transcript of November 4, 1988, hearing at 60.

[5] To dispel any doubt about where the overwhelming weight of authority lies on this issue, respondent refers the Court to the following cases in which the pollution exclusion was held to bar coverage where toxic wastes were deliberately discharged by the insured onto its land as a routine business practice, resulting in contamination to soil and ground or surface waters: *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33 (1st Cir. 1984); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132, 140 (E.D. Pa. 1986); *Hayes v. Maryland Cas. Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988); *USF&G v. Korman Corp.*, 693 F. Supp. 253 (E.D. Pa. 1988); *American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984);

nize, there is nothing "sudden and accidental" about toxic discharges occurring routinely, deliberately, and continuously over a period of many years and as a matter of regular business practice. *E.g., Hartford Acc. & Indem. Co. v. USF&G*, 962 F.2d 1484, 1489 (10th Cir. 1992), *citing USF&G v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988); *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39, 42 (2d Cir. 1991); *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 F.2d 66, 73 (1st Cir. 1991).

Nor is there any issue in this case involving the meaning of "sudden." That issue of Colorado law was resolved in favor of insureds by the Colorado Supreme Court in *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991). The Tenth Circuit followed that ruling here.[6] Petitioners are hardly in a position to seek review in this Court of that favorable construction simply because courts construing the law of *other states* came to a different conclusion.

International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 552 N.E.2d 758 (Ill. App. 1988); *Waste Mgt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. 1984). *Accord Lumbermens Mut. v. Belleville Indus.*, 938 F.2d 1423, 1429-31 (1st Cir. 1991); *State of New York v. Amro Realty Corp.*, 745 F. Supp. 832, 839 (N.D.N.Y. 1990), *aff'd on this issue*, 936 F.2d 1420, 1428-29 (2d Cir. 1991); *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d at 42; *USF&G v. Morrison Grain Co.*, 734 F. Supp. 437, 447-49 (D. Kan. 1990); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154 (Ill. App. 1991).

[6] Petitioners' reliance (Pet. at 13) on *New Castle Co. v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991), is also misplaced. Although *New Castle*, like *Hecla*, interpreted the word "sudden" to mean "unexpected," it also held, again consistent with *Hecla*, that this construction did not alter the effect of the exclusion where the discharge of toxic chemicals into and onto the land was intentional. *New Castle* then remanded the case for a factual determination of whether the *discharge* of toxic chemicals by the insured, as opposed to the *damage* caused by the discharge, was unexpected and unintended. 933 F.2d at 1203. After remand, the court held that the discharge was *not* sudden and *not* covered. *New Castle Co. v. Hartford Acc. & Indem. Co.*, 1992 W.L. 174419, *6 (3d Cir. 1992). There is no conflict with the Tenth Circuit opinion in this case.

The petition for a writ of certiorari should be denied. Petitioners' invocation of the specter of forum shopping as a reason to justify creation of a federal common law of insurance contract interpretation is without merit.

II. THE COURT OF APPEALS ACTED WITHIN ITS POWER IN REVERSING THE JUDGMENT AND ORDERING THAT THE POLLUTION EXCLUSION BARS COVERAGE OF BRODERICK'S TOXIC WASTE DISCHARGES INTO THE PITS

Petitioners err in contending (Pet. at 17-18) that the court of appeals was without power to hold, as a matter of law, that the pollution exclusion bars coverage of Broderick's toxic waste discharges into the pits, simply because Hartford did not renew its motion for directed verdict at the close of all the evidence or move for judgment n.o.v.

Throughout this litigation, Hartford consistently argued that the pollution exclusion precluded coverage as a matter of law and asked the court of appeals to so order. Hartford's opening brief at 49; Hartford's reply brief at 25. That is precisely what the Tenth Circuit did, as to Broderick's discharges into the pits. In their principal brief, petitioners did not quarrel with this request for relief or raise any issue regarding Hartford's failure to move for directed verdict or judgment n.o.v. Thus, petitioners waived this argument, and cannot raise it here. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In any event, petitioners' contention does not withstand scrutiny. Under 28 U.S.C. § 2106, the Tenth Circuit had the power to reverse the judgment and order, as a matter of law, that the pollution exclusion barred coverage for Broderick's discharges into the pits. Section 2106 authorizes the court of appeals to:

> . . . affirm, modify, vacate, set aside or *reverse* any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the

> cause *and direct the entry of such appropriate judgment, decree, or order*, or require such further proceedings to be had as may be just under the circumstances. [Emphasis added.]

Given the undisputed fact that Broderick's discharge of waste into the pits was neither sudden nor accidental, the court of appeals' conclusion that the pollution exclusion barred coverage as a matter of law was both correct and appropriate.

Again, if petitioners were correct, this allegation of error has no significance outside the scope of this case, and for that reason alone, does not warrant Supreme Court review. Petitioners' argument again fails to recognize that this Court's role is not to correct error, but to resolve conflicts among the lower courts and to determine legal questions of great importance. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). There simply is no basis for Supreme Court review here.

CONCLUSION

The petition for a writ of certiorari should be denied both because petitioners raise no important issue warranting review by this Court and because the Tenth Circuit's ruling is correct.

Respectfully submitted,

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No. 92-0092

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BRODERICK INVESTMENT COMPANY, a partnership and successor to Broderick Wood Products, Inc.; THE COLORADO NATIONAL BANK OF DENVER, as trustee; and THE FIRST INTERSTATE BANK OF DENVER, N.A., as trustee,
Petitioners,

v.

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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August 20, 1992

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RULE 29.1 LIST

The list required by Sup. Ct. R. 29.1 is included in the petition for a writ of certiorari, as supplemented by letter to the Clerk dated July 14, 1992. No amendments to the list are necessary at this time.

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REPLY BRIEF OF PETITIONERS

Respondent argues that this case "does not present an issue of federal law, a conflict of law among the circuit courts, or any other reason supporting Supreme Court review . . . ." Opp. 5. On the contrary, the petition presents two highly significant questions of federal law. First, the Tenth Circuit departed from Erie R. Co. v. Tompkins, 304 U.S. 64 (1937), posing an issue of federal law whose importance is enhanced by the distinctive features of this case. Pet. 9-10. Second, the Tenth Circuit's remedial ruling conflicts directly with this Court's precedent. Pet. 17. That ruling therefore unquestionably presents a well-established basis for certiorari review. Sup. Ct. R. 10.1(c).

I. The Court Of Appeals Departure From *Erie* Warrants This Court's Review.

1. Respondent claims (Opp. 6) that petitioners ask the Court to "create federal common law" and to "provide a uniform interpretation of the law of various states on the pollution exclusion . . . ." Petitioners seek no such ruling. Rather, petitioners seek to enforce the principle -- grounded in Erie -- that federal courts are not free to depart from state law and to fashion their own interpretation of the pollution exclusion clause. As demonstrated in the petition (Pet. 11-15), the Tenth Circuit did not undertake the second step of the analysis that Colorado law mandates in the interpretation of an exclusionary clause. Respondent offers no basis in Colorado law for upholding the Tenth Circuit's decision (Opp. 6-8), citing instead cases from other jurisdictions that address entirely distinct issues under the pollution exclusion clause. See infra at ¶ 3. Respondent thereby confirms that the Tenth Circuit's approach cannot be defended under Colorado law and was a violation of Erie.

2. Respondent's suggestion that choice of law principles "preclude any real concern with forum shopping in any case, and . . . especially . . . here" (Opp. 6 n.3) is without merit. If choice of law principles alone afforded sufficient protection against forum shopping, then Erie itself was wholly unnecessary. If anything, the Tenth Circuit's decision, and respondent's inability to defend it under Colorado law, illustrates the fallacy of respondent's argument. Here, the fact that Colorado law was applicable was meaningless because the Tenth Circuit chose not to follow it.

3. Respondent next attempts to paint Broderick as an intentional polluter (Opp. 7; see also id. 2-3) and the Tenth Circuit's opinion as consistent with the "overwhelming weight of authority" (Opp. 7). Respondent's factual allegations were soundly rejected by the jury which, after hearing all of the evidence respondent cites and all of the arguments it advances, specifically found that Broderick neither expected nor intended the release or escape of wastes from the ponds or the damage to the groundwater. Special Verdict ¶ 2(A) through (H). This key factual distinction is one of the reasons why none of the cases on which respondent relies (Opp. 7 n.5; id. at 8) has any application here. Unlike this case, respondent's cases either involved knowing, intentional pollution, or they held that the "sudden and accidental" phrase in the pollution exclusion has a temporal component that cannot be met by waste disposal practices occurring over time. Here, by contrast, the jury's verdict precludes any suggestion of knowing, intentional pollution, and Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090-92 (Colo. 1991), establishes that in Colorado, the phrase "sudden and accidental" does not have a temporal component and is satisfied by proof that the discharge was neither expected nor intended by the insured.

Thus, respondent's argument, and the cases it cites, are a smoke screen designed to evade the real issue in this case. The issue is whether the phrase "discharge, dispersal, release or escape" is subject to any reasonable interpretation other than the one the Tenth Circuit adopted. Respondent does not even contest (Opp. 6-9) petitioners' showing of reasonableness (Pet. 12-15), further confirming the Tenth Circuit's departure from Erie.

4. Respondent's attempt (Opp. 8 n. 6) to distinguish New Castle County v. Hartford Accident & Indemnity Co., 933 F.2d 1162 (3d Cir. 1991), is equally futile. In its first opinion, the Third Circuit's analysis plainly focused on the secondary discharge, i.e., from the landfill into the groundwater. 933 F.2d at 1169, 1199-1203. On appeal after remand, the Third Circuit did not alter this analysis; rather, it simply held that coverage was barred because the district court had found that the insured had intended the discharge of leachate from the landfill. New Castle County v. Hartford Acc. & Indem. Co., 1992 WL 174419, at 1, 6 (3d Cir. July 28, 1992). Here, by contrast, the jury found that the secondary discharge, i.e., from the ponds into the groundwater, was neither expected nor intended by petitioners. Under New Castle, then, petitioners were entitled to coverage. This disparity in the approaches of federal circuit courts en-

courages, not hinders, the forum shopping that Erie was intended to prevent.

II. The Court Of Appeals Choice Of Remedy Conflicts With This Court's Precedent.

1. Respondent claims that petitioners waived their challenge to the Tenth Circuit's erroneous remedy by not raising it in their answer brief. This argument finds no support in the only case respondent cites, Neely v. Eby Constr. Co., 386 U.S. 317 (1967). Neely addresses the very different question of an appellate court's power to direct the entry of judgment for a verdict loser who did file a motion for judgment n.o.v. Indeed, precisely because the filing of such a motion grants such power to the appellate court, Neely identifies occasions when the verdict winner may make a contingent request for a new trial. 386 U.S. at 328-29. Neely does not apply here because the key prerequisite -- a timely-filed motion for judgment n.o.v. -- never occurred. As the cases cited by petitioners (Pet. 17) demonstrate, the absence of such a motion, or of a renewed motion for directed verdict, precludes an appellate court from directing the entry of judgment for the verdict loser. In such a case therefore, there is no reason for the verdict winner to make a contingent request for a new trial -- the risk that judgment could be entered against the verdict winner simply never arises.

In any event, this Court's rulings establish that because no such motions were filed here, the Tenth Circuit simply had no power to direct the entry of judgment for respondent on the issue of coverage for the ponds. Pet. 17. Petitioners' challenge to the Tenth Circuit's usurpation of power, like a jurisdictional challenge, could not be waived. Finally, petitioners raised the issue at the earliest possible opportunity, i.e., in their petition for rehearing following the panel's decision directing entry of judgment for respondent, and the panel addressed it, modifying the earlier opinion to grant a partial new trial on the issue of coverage. Pet. App. 16a-17a.

2. Respondent's reliance on 28 U.S.C. § 2106 (Opp. 9-10) is equally erroneous. The statute is simply a broad grant of general authority to the federal appellate courts; it says nothing about the exercise of that authority in a particular case. The statute does not, and could not, confer on the circuit courts power that the Seventh Amendment of the Constitution denies them.

3. Respondent's only response to petitioners' showing (Pet. 17-18) that the Tenth Circuit's ruling as to the ponds conflicts directly with this Court's decisions is to assert that "this Court's role is not to correct error, but to resolve conflicts among the lower courts" (Opp. 10). Respondent overlooks petitioners' showing that the Tenth Circuit's ruling squarely conflicts with decisions of both this Court and other circuit courts. Pet. 17-18. The fact that this Court has resolved the issue does not mean that the Tenth Circuit's non-compliance, and the resulting violation of petitioners' Seventh Amendment rights, should be ignored or overlooked. Rather, it warrants summary reversal of the Tenth Circuit's ruling, and a remand with directions that the new trial should include the issue of the application of the pollution exclusion to the containment ponds.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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